NO. 134

IN THE

Supreme Court of the United States

October Term, 1955

CLARK SQUIRE, Collector of Internal Revenue for the District of Washington, *Petitioner*

v.

HORTON CAPOEMAN and EMMA CAPOEMAN, His Wife

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE

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BRIEF OF AMICI CURIAE

PRELIMINARY

The undersigned attorneys, on behalf of other members of Indian tribes vitally interested in the rule of law to be established in the present case, present herewith, with the consent of the parties, their views as amici curiae, and urge affirmance of the judgment below.

QUESTION PRESENTED

Whether monies received as a result of converting into cash a portion of the corpus of lands held in trust by the United States for non-competent Indians under the General Allotment Act of 1887, are taxable as income for Federal income tax purposes?

STATEMENT

Horton Capoeman, and his wife Emma, who are the taxpayers here involved, are non-competent Indian wards of the United States (R. 33). On October 1, 1907, pursuant to the General Allotment Act of 1887 (24 Stat. 388), a trust patent was issued to Horton Capoeman for 93.25 acres of tribal land. The fee title to this land was and still is held by the United States in trust for Horton Capoeman, and said land was not and still is not subject to alienation or encumbrance by Capoeman except with the consent and approval of the United States.

During 1943, $8,418.28 worth of timber was cut, sold and paid for from Capoeman's allotted land, pursuant to a contract of sale entered into by the Bureau of Indian Affairs of the United States. Capoeman received a distribution of $1,537.00 of the $8,418.28 sales price, and the remaining $6,878.00 ($3.28 unaccounted for) was placed in trust by the United States for the sole use and benefit of Capoeman.

On October 10, 1949, Capoeman filed a joint income tax return for calendar 1943, reporting a long term capital gain from the timber sale in 1943, and paid the tax shown due.

On January 2, 1948, Capoeman filed a claim for refund of the taxes paid on the ground that the monies

received from the sale of timber from the allotted land were not subject to taxation as income because such taxation would violate the trust patent. On January 21, 1948, the Bureau of Internal Revenue denied the refund claim. (R. 35-40).

SUMMARY OF ARGUMENT

Under Section 5 of the General Allotment Act of 1887 (24 Stat. 388), the United States is obligated to hold Capoeman's allotted land "in trust for the sole use and benefit of the Indian" and at the end of the trust period to convey the land to the Indian in fee, "discharged of said trust and free of all charge or incumbrance whatsoever." The timber was a part of the real property held in trust. Sale of the timber was a sale of a part of the realty, and the price received for the timber was only a substitute for the real estate. The transaction was the same in quality and kind as the sale of a parcel of land out of a larger tract. The money received from the timber sale was a substitute for a portion of the corpus of the trust, and stood in lieu therof. Until the allotted trust land is conveyed to the Indian in fee and the trust discharged, it is not a capital asset subject to tax or any other charge or incumbrance which might diminish its value.

ARGUMENT

Section 5 of the General Allotment Act of February 8, 1887 (24 Stat. 388) provides in pertinent part:

> "* * * upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees * * * and declare that the United States does and will hold

> the land thus allotted * * * in trust for the sole use and benefit of the Indian to whom such allotment shall have been made * * *, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever * * *"

Alienation by the Indian of the trust land so allotted is restricted, (24 Stat. 388), and the trust continues in force today (48 Stat. 984). Some collateral questions such as the language of the treaties with the Quinaielts of 1855 and 1856 (12 Stat. 971), the tribe to which Capoeman belonged, Internal Revenue regulations relating to timber (Treas. Reg. 111, Sec. 29.23 (m)-20), and certain forest regulations (25 C. F. R., c. I, Sec. 61) have been raised in the Government's brief. However, the central and critical question is the meaning of the phrase "free of all charge or incumbrance whatsoever" as it occurs in Section 5 of the General Allotment Act. This tax exemption, once granted by Congress, is a vested property right which cannot constitutionally be impaired by subsequent legislation. *Choate* v. *Trapp*, 224 U. S. 665 (1912). Therefore, insofar as the broad statutory concept of income as used in the Internal Revenue Code, I.R.C. Sec. 22(a), is repugnant to this tax exemption, it is void.

The giving up by these Indians of their nomadic life, their communal lands and property, the adoption of the white theory of individual ownership, the stopping of Indian wars, the opening of their lands to white settlement, all constitute a valid and valuable consideration for the tax exemption, as opposed to a gratuitous tax exemption. As the laws of gratuitous suretyship, and suretyship for hire, are different, so

are the laws of gratuitous exemption and exemption for a consideration.

The United States was always the moving party in the course of dealing with the Indian; yet its treaties were never unilateral. The Indian was sought out by envoys, (usually the military) of the United States, and solemn agreements were drawn and formally entered into. While they appear to be "treaties", actually "strong arm" methods were employed with the Indians being advised that if they did not sign; that war would follow and the white man could and would take their lands by force. The trial court's statement concerning "somewhat coercive bargaining" is an understatement.

The failure to use the word "taxation" in the agreements with the Indians may be attributed to the fact that when these agreements were entered into, there was no Federal Income Tax. The more inclusive word "incumbrance", having a far broader connotation in the white men's mind, was used.

The rule has long obtained that judicial construction of Acts of Congress relating to Indians is liberal, not strict. Doubtful expressions are not to be resolved in favor of the United States, but in the best interests of the Indians, who are wards of the Government and wholly dependent upon its protection and good faith in carrying out its statutory pledges. In *Carpenter* v. *Shaw*, 280 U. S. 363, this Court said:

> "* * * doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."

See also *Worcester* v. *George*, 6 Pet. 515, *Jones* v. *Meehan*, 175 U. S. 1, and *U. S.* v. *Rickert*, 188 U. S. 432.

This, then is the rule of construction to be applied.

This Court has spoken before on the meaning of the General Allotment Act. In *U. S.* v. *Rickert*, 188 U. S. 432, this Court held that lands allotted under the General Allotment Act were exempt from state taxation during the trust period, on the ground that taxing such lands during the trust period would be to tax an instrumentality of the United States. This basis has since been modified to some extent, but the second basis for the holding was stated as follows:

> "* * * if they may be taxed, then the obligations which the Government has assumed in reference to these Indians may be entirely defeated, for by the Act of 1887, the Government has agreed at a named time to convey the land to the allottee in fee, discharged of the trust, 'and free of all charge or encumbrance whatsoever.' To say that these lands may be assessed and taxed * * * is to say they may be sold for the taxes, and thus become so burdened that the United States could not discharge its obligations to the Indians without itself paying the taxes imposed from year to year, and thereby keeping the lands free from encumbrance."

While the Rickert case was concerned with a state ad valorem tax, there would seem to be no difference. A rose is a rose, regardless of name.

The Rickert decision came down in 1902. Subsequently, in 1906, Congress amended Sec. 6 of the General Allotment Act (34 Stat. 182) to provide that at the end of the trust period, "all restrictions as to sale, incumbrance, or taxation, shall be removed." This is

proof positive that Congress intended the allotted trust lands to be tax exempt.

During the 1920's, the Government engaged in a wholesale patenting in fee of Indian trust lands, whether the Indian desired it or not. As a result, the fee owners became liable for taxes. Shortly thereafter the Government reversed its policy and canceled these fee patents. Numerous suits were filed to enjoin state taxation and to strike these allotments from the tax rolls, and the Government was successful in each case, on grounds well expressed in *U. S. v. Nez Perce Co.*, Idaho, 95 F. 2d 232.:

> "* * * the Allotment Act (of 1887) as well as the trust patent, by plain implication granted the Indian immunity from taxation during the trust period or any extension of it, and he had the right finally to receive his lands 'free of all charge or encumbrance whatsoever.' The authorities are uniform to the effect that this right of exemption is a *vested* right, as much a part of the grant as the land itself, and the Indian may not be deprived of it by the unwanted issuance to him of a fee patent prior to the end of the trust period. * * * Treaties with the Indians and Acts of Congress relative to their right in property reserved to them have always been liberally construed by the Courts. The dependent condition of these wards of the Government makes it imperative that doubtful provisions in treaties and statutes be resolved in their favor."

This is a fair and reasonable statement of the construction to be given the Act of 1887.

In *U. S. v. Homeratha*, 40 F. 2d 305, it was held that income directly derived from the allotments under the 1887 Act is not subject to federal income tax. See

also *Blackbird* v. *Commissioner*, 38 F. 2d 976, and *Pittman* v. *Commissioner*, 64 F. 2d 740.

An "incumbrance" has a long established meaning in law as a claim or lien which burdens an estate. (42 C.J.S. 549, et seq). A tax is a burden, a lien, a claim, both contingent and actual. It diminishes the value of the fee, and all the wriggling with semantics that the Government musters in its brief does not change that melancholy fact.

Apart from the question of tax exemption and incumbrance is the fundamental obligation of the United States as trustee for its Indian wards. This obligation was defined and clarified by the U. S. District Court for the Western District of Washington in the case at bar. (110 F. Supp. 924):

> "The United States now has a sum of money in trust for these Indian wards. It is demonstrable that this amount is part and parcel of the corpus of a trust estate which the Government has held ever since the treaties of 1855 and 1856. Before that date, the Indians had rights of occupancy in a vast territory. These were ceded to the United States in return for protection and tutelage. But there was expressly reserved the title to a tract of land.[3] The United States held the legal title thereof as trustee. When the alottment acts were given effect, there was no change in this situation. The Indians simply relinquished their respective claims to a large area of communal lands, and each respectively accepted in lieu thereof equitable title to a definite parcel of land allotted in severalty. At the end of the trust period, a conveyance was to be made to the Indian or his heirs of such parcel of land in fee "discharged of said trust and free of all charge or incumbrance whatsoever."

"This is a simple restatement of the obligation of the trustee. As a result, the United States has no power to levy a duty or impose a charge upon the lands over which it has plenary power by virtue of ownership and sovereignty. The State of Washington can levy no tax on the whole or any part or parcel thereof. After the conveyance, which must be authorized by the Indian in order to burden him with the weight of obligation, the national and state governments are empowered to tax this land and its increments as the real property of any other citizen. It follows that, until the land is thus conveyed, it cannot be treated as 'capital' or a 'capital asset.' For, by such classification, the United States would be violating not only a moral right of the Indian, but would be violating the statute by placing a "charge or incumbrance" on the land. The state cannot collect back taxes upon land before the date of conveyance in fee to the Indians. The federal government has no right upon a sale by the Indian, immediately after a patent to him in fee, to tax the difference in value between the date of the treaty, or even March 1, 1913, and the date of sale as a capital asset. By that process it could destroy the value of the trust property. Likewise, there could be no tax upon a sale by the United States of ten acres out of an hundred acre allotment with the consent of the allottees before the end of the trust period. The reason is that the government had the real property in trust before the sale of part thereof, and the price received is only a substitute charge. But here the sale was of part of the realty. Timber, until severed, is part of the land. No distinction can be drawn between the operation and the sale of a parcel out of a larger area.

"During the long history of the Chancelors and in the equity courts, cutting of timber by one not the owner of the fee constituted waste, and the proceeds of timber cut by a trustee was a part of the

> trust estate. If the timber had remained standing upon the land until patent issued in fee, neither state nor national government could have taxed it because it was part of the trust property. Nor on sale of the severed timber after patent could the increment in value be based upon a date prior to the transfer of the land to the Indian."

It is significant that the U. S. Court of Appeals adopted the trial court's opinion and reasoning as its own, and characterizing the Government's position thusly:

> "Enough to say that in our view this attempt to tax evidences, at the least, a sorry breach of faith with these Indians. We may say that while the court below appeared to regard as distinguishable the decision of the Tenth Circuit in the cognate case of *Jones* v. *Taunah*, 186 F. 2d 445, we see no ground upon which the holding can be distinguished. Rather, we agree with the dissenting opinion of Chief Judge Phillips."

The United States as a trustee for the Indians is duty bound to maintain the trust estate intact. If a smaller portion of the trust estate is detached from the larger area, it does not *ipso facto* undergo some strange alchemy and become income—it remains a part of the corpus of the trust estate. If a lesser portion of the trust estate is substituted for property of another kind, the exchanged property is a part of the corpus and must be maintained intact in accordance with the terms of the trust arrangement. If a smaller portion of the trust estate is converted into cash, the cash becomes a part of the trust estate and must be held intact for the Indians (wards). Timber, like oil, is a part of the real estate held in trust. It is a wasting asset, extraction or severance of which invades and diminishes

the value of the trust estate corpus. The situation cannot be more clearly described than it was in Chief Judge Orie Phillips' dissent in *Taunah* v. *Jones*, 186 F. 2d 445; a similar case involving oil sales from restricted, allotted trust lands:

> "For income tax purposes all of the proceeds derived from oil and gas is regarded as gross income. But viewed realistically, oil and gas are exhaustible and irreplacable natural resources. Once withdrawn from land they are gone forever. Ordinarily, when oil and gas is found in land in paying quantities, the oil and gas rights are much more valuable than the surface. Had the United States not permitted the oil and gas to be removed from the original allotments during the trust period, under departmental leases and in consideration of royalties paid to it for the benefit of the allottees, it would have been obligated at the end of the trust period to transfer to each allottee his allotted land in fee simple, free and clear from all charges and encumbrances, including both the surface rights and the oil and gas and other minerals in the land. What it in effect did, acting as trustee for the allottees, was to exchange the oil and gas for cash during the trust period. Its obligation, under the agreement, in my opinion, at the end of the trust period will be to transfer the land and the cash which it received for the oil and gas extracted from the land, undiminished. To do less than that would not be to fulfill either the letter or the spirit of its obligation under the agreement of October 21, 1892.
>
> "With respect to the inherited lands, no such obligation exists. The right to take property by descent is a privilege or creature of the law and not a matter of inherent right. The obligation of the United States to convey the original allotment undiminished to the allottees at the end of the trust period would not lawfully be changed. To do so

would impair the contract period. But the right of the heirs of an allottee to take his allotment is a mere privilege of the law and is subject to change at the will of Congress.

"With respect to the income derived by the allottee from oil and gas royalties from his original allotment, the instant case is distinguishable from *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598. That case dealt with a state inheritance tax and not income tax on royalty received under an oil and gas lease of an original allotment. That tax diminished what an heir received. The tax here on oil and gas royalty from the original allotment will diminish what the original allottee will receive.

"For the reasons indicated I would hold that the royalties derived from leases on the original allotments are not subject to Federal income tax, but that interest earned by investment of royalty funds, agricultural income and royalty income from inherited lands are subject to Federal income tax."

What the case at bar presents is not a problem in tax administration, but a capital levy. The federal tax authorities seek in the guise of an income tax to seize a portion of an Indian's trust estate, an estate which is restricted and inalienable, an estate over which the Indian ward has no unrestricted power of disposition. The federal tax officials, in an endless quest for fuel to feed the money needs of a central Government, have become deaf and dumb and blind to logic and common fairness. If wasting assets held in trust become income when converted to cash, the Indians will receive precious little by way of capital distribution when the day of reckoning up and discharging the trust arrives. Imposition of federal income tax on monies received

in lieu of portions of the trust corpus is inconsistent with the Government's obligation to hold the trust estate intact for its Indian wards.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals is correct, and should be affirmed.

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